Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-50

CINCINNATI GAS & ELECTRIC COMPANY,
Owner of M/V "Reddy Kilowatt",
Petitioner,

v.

PATRICIA ABEL
dba NEW RICHMOND BOATING CENTER,
Respondent.

MEMORANDUM OF RESPONDENT

PHILIP J. SCHNEIDER
Attorney for Respondent
1318 Central Trust Tower
Cincinnati, Ohio 45202

Of Counsel:
WAITE, SCHINDEL, BAYLESS & SCHNEIDER
1318 Central Trust Tower
Cincinnati, Ohio 45202

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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v.

PATRICIA ABEL
dba NEW RICHMOND BOATING CENTER,
Respondent.

MEMORANDUM OF RESPONDENT

QUESTION PRESENTED FOR REVIEW

The only question involved in this appeal is:

> "Where a complaint is filed in the United States District Court captioned "AN ACTION FOR EXONERATION FROM OR LIMITATION OF LIABILITY", more than six months after the Appellee has given such owner a written notice of the claim, is such claim for limitation of liability barred by reason of Title 46, U.S.C., § 185, and Supplemental Rule F of the Federal Rules of Civil Procedure?"

Petitioner in its statement of the question presented, says:

> "Where, in a maritime tort action properly pending in a state court, the plaintiff challenges the right of the vessel owner under 46 U.S.C. § 183(a) to limit liability. . . ."

This is not true because the Fourth Defense of the Claim and Answer (App. I, 25a) says:

> "Plaintiff's Complaint was not filed within the time provided by law for the filing of such actions. Under the provisions of the 46 U.S.C. Sec. 185 and Supplemental Rule F(1) of the Federal Rules of Civil Procedure, a complaint for limitation of liability must be filed not later than six months after receipt by the vessel owner of written notice of the claim."

No mention is made of § 183.

STATEMENT OF THE CASE

When trying to circumvent a crystal clear statute of limitations it takes thousands of words to unfold a legal theory. Petitioner takes 32 pages of argument attempting to circumvent the simple six months *filing* limitation of a *Liability Limitation* action in the United States District Court. This same lengthy argument was found specious by two United States District Judges and three United States Court of Appeals Judges, with no contrary findings by any court in a situation such as here presented, and Judge Lively below said his court could not find any (App. M, 40a).

At about 11:15 P.M. on July 7, 1972, a ferry boat owned by co-defendant, New Richmond Ferry, Inc., broke loose from its mooring to a tree on the Ohio side of the Ohio River, and drifted downstream into the marina which had been hand-constructed from year to year by Patricia Abel and her family, and very successfully operated for several years. As a result of its colliding with the marina negligible damage ($3,650.00) was done. While this was going on, Petitioner claims that it was

> ". . . summoned to the scene by the police and, in the course of her Good Samaritan efforts, came in contact with the marina." (Brief, p. 4).

After giving written notice to CG&E on January 30, 1974, the Complaint was filed in the Ohio Court of Common Pleas on May 7, 1974, against Petitioner, alleging, inter alia:

> "9. Defendant, Cincinnati Gas & Electric Company, was negligent in the operation of its tug, repeatedly fouling, striking, ramming, and colliding with Plaintiff's marina and work boat." (App. A, 3a).

resulting in total damage to the marina; then valued in excess of quarter of a million dollars, without adding four years' intervening inflationary costs for replacement. The filing of this Complaint was *well within the six months allowed* by Statute and Rule for filing a limitation of liability action in the United States District Court (46 U.S.C. § 185; Supplemental Rule F) FRCP.

Plaintiff had not, nor ever has had, either the means or the borrowing power to replace the marina, although one of Petitioner's defenses is that she should have mitigated her damages.

Petitioner principally bases its reason for granting a Writ of Certiorari on the specious theory that the boat owner should not have to choose to limit liability within six months after being notified of a claim before he *knows* that formal claim will be filed if claimed elsewhere. The actual fact which kills this case is CG&E had eighty-four (84) days after the claim was formalized, by a *suit duly filed*, within which it could have filed its Limitation of Liability action in the United States District Court. It elected not to do so at its peril.

Petitioner filed its answer to the Complaint with a cross-claim against New Richmond Ferry, on June 19, 1974. Thereafter a Motion for Summary Judgment was filed by Petitioner, based upon its Seventh Defense seeking Limitation of Liability down to $52,500.00 (the alleged value of the tug). (App. B, 7a).

The Ohio Common Pleas Court undisputedly correctly found it had no jurisdiction over the admiralty question of Limitation of Liability, and stayed that proceeding pending further action by Petitioner. (App. G, 19a).

On December 3, 1974, Petitioner filed its Liability Limitation action in the United States District Court for the Southern District of Ohio, Western Division, captioned "*Cincinnati Gas & Electric Co., Plaintiff, Owner of M/V "REDDY KILOWATT", in an Action for Exoneration from or Limitation of Liability*". (App. H, 20a) to which Patricia Abel filed her *Claim and Answer* (App. I, 24a), the fourth defense of which alleged that the

> ". . . complaint was not filed within the time provided by law for the filing of such actions under the provisions of 46 U.S.C., § 185, and Supplemental Rule F(1) of the Federal Rules of Civil Procedure. . . ." (App. I, 25a).

and seeking that the Complaint be dismissed at its cost and that the case be remanded to the Court of Common Pleas, Hamilton County, Ohio (App. I, 25a).

Upon *Claimant's Motion to Dismiss and/or for Summary Judgment*, filed February 14, 1975, and after briefs and arguments, the United States District Court wrote an Opinion, filed July 8, 1975, (App. K, 28a), finding in favor of Claimant, and dismissed the action and entered an order accordingly (App. L, 33a).

Immediately (July 10, 1974) Patricia Abel filed a *Motion to Reinstate and to Advance the Case for Trial* in the Ohio Court of Common Pleas (Ex. A hereto), which was thereafter stayed because Petitioner filed its Notice of Appeal (July 25, 1975) in the United States Court of Appeals for the Sixth Circuit followed by its Brief on October 28, 1975. Before that brief Patricia Abel filed a *Motion to Advance Case for Hearing*, based on extreme hardship, on October 20, 1975, with memorandum in support thereof (Ex. B), which was forthwith granted. The case was advanced and argued on February 13, 1976, and the Opinion was filed April 16, 1976 (App. M, 34a). On May 6, 1976, Patricia Abel filed a new *Motion to Reinstate and to Advance the Case for Trial*, in the State court, with a memorandum in support thereof (Ex. C). This motion was argued and granted on June 10, 1976, setting the case for trial August 23, 1976.

Petitioner opposes the motion for early trial setting, alleging as a reason that it proposed to petition this Court for a Writ of Certiorari. Nevertheless the Court permitted the trial setting to stand, and when the entry accordingly was filed, Patricia Abel filed a *Motion for Separate Trial of Liability and Damages*, with a memorandum in support (Ex. D). Petitioner is resisting this Motion for Separate Trial, and filed a memorandum on June 15, 1976, to which Patricia Abel filed a reply memorandum on June 23 (Ex. E). Oral argument on the motion for separate trials will be heard on August 2nd. On July 12, 1976, Petitioner filed a new motion to Vacate the Trial Setting because this Petition was then filed.

Parenthetically, Patricia Abel is without the use of her marina, and without the substantial income to which she had become accustomed, and has been greatly financially embarrassed in the raising of her family. (Ex. B, 50).

ARGUMENT

Petitioner concedes that it had written notice of the claim dated January 30, 1974 (App. I, 26a). Suit was filed in Ohio State Common Pleas Court against Petitioner on May 7, 1974. The action below was filed on December 3, 1974 (App. H, 20a).

In so far as this action is concerned, the important factor is that Patricia Abel *rightfully* filed her suit in the Common Pleas Court of Hamilton County, Ohio, alleging that

Petitioner and New Richmond Ferry participated in varying degrees in the destruction of her marina, which she and her family had built and successfully operated for many years. It was clear that the State court was without authority to enforce a maritime limitation of liability set up by CG&E. It is equally clear that this limitation action filed in the U.S.D.C. was entirely independent of and sought separate relief from that of the Common Pleas Court action, which was neither *removed* nor in any way *transferred*, nor could it have been.

U.S.C., Title 46, § 185 (Br. 3), is an added amendment to Chapter 8, "Limitation of Vessel Owner's Liability", of Title 46, "Shipping", and became law on June 5, 1936. At the same time of the enactment of § 185, § 183(a) was repealed and § 183(c) was revised; § 183(b) had been added on August 29, 1935.

According to 28 U.S.C., § 2071, this Court may from time to time prescribe rules for the conduct of its business, provided that such rules are consistent with the Acts of Congress. Since Congress passed 46 U.S.C., § 185, effective June 5, 1936, amending the March 3, 1851, C. 43, § 4; 9 Stat. 635, which earlier statute had not limited the time for filing a Limitation of Liability action after notice, thus Supreme Court Admiralty Rule 51 would be in conflict, and this Court was obligated to enact Rule F limiting such Limitation of Liability to six months.

Section 185 providing that

> ". . . Within six months after the claimant shall have given to or filed with such owner written notice of the claim MAY petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter as amended. . . ."

Petitioner emphasises the word MAY, as do we. We submit that Congress is not *requiring* that the ship owner

file for limitation of liability, but *permits* him to do so. However, when he elects to do so, he MUST make such filing within six months after notice in the Federal District Court.

Applying this reasoning to the instant case, New Richmond Ferry, causing $3,650.00 worth of damage, would never file a limitation of liability action when its ferry boat was worth slightly under $10,000.00, and § 185 does not require it to do so. On the other hand, CG&E, with an exposure of over half a million dollars, and a tug worth $52,500, obviously should take advantage of the provision of § 185, but electing to do so, it *must* do it within six months *after notice from the claimant.*

Calendar No. 2165 of the 74th Congress, Second Session Senate Report No. 2061, reporting on "Limitation of Ship Owners' Liability" reports no oral comment by members of Congress as to this precise point, but on page 6 under the heading "The Proceeding to Limit Liability—Deposit of Security and Time for Filing of Petition", explains—

> "The proposed amendment to section 4285 provides, first, that the vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of a claim, may petition a *district court of the United States of competent jurisdiction for limitation of liability.* Under the old law there was no time fixed within which such a petition might be filed." (Emphasis added).

Thus it seems perfectly clear that MAY is *permissive* as to the right of the ship owner to limit his liability, but *mandatory* as to the time and place within which he may elect to do so.

Mr. Justice Clark, in *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147 (1957), during the course of his opinion of the majority, at 151, while discussing § 184 and its meaning, goes on to say:

> "The succeeding section (185 sic) provides that in such an event the owner "may petition a district court of the United States . . . for limitation of liability within the provisions of this chapter. . . ." It further declares that upon compliance with its requirements "all claims and proceedings against the owner with respect to the matter in question shall cease." This provision is implemented by Rule 51 of our admiralty rules which spells out in more detail *the manner* in which the owner of any vessel who shall "desire to claim the benefit of limitation of liability . . ." shall proceed." (Emphasis added.)

This legislative history simply fortifies the two opinions below, and the one by Chief Judge Charles F. Paul in *Ohio River Co.* v. *City of Wheeling*, U.S.D.C., N.D., W.Va., 225 F. Supp. 733 (1964), which was the first case raising this identical question.

The essential facts of that *Ohio River Co.* case are *identical* to the facts here. Judge Paul's opinion was not appealed. That opinion was well-considered, and has been known to river carriers since January, 1964, eight years before this catastrophe. Thus, CG&E was, or should have been, well aware of the risk it took by not *properly* raising the Limitation of Liability defense during the 84 days following the commencement of this action in the Ohio Court of Common Pleas. Judge Porter below discussed and followed that opinion (App. K., 32a), holding:

> "We have thus reasoned through to the same conclusion reached by Judge Paul in an all fours case, *Ohio River Co.* v. *City of Wheeling*, 225 F. Supp. 733 (D.C. W.Va. 1964), the court there, as do we, relying in part in reaching its decision, upon regulation of "the diminishing value of and justification for limitation of liability."

Judge Lively for the 6th Circuit Court of Appeals below (App. M, 41a), said:

> "Furthermore, the entire case was before the district court from its inception. It is apparent that there is a difference, in terms of jurisdictional considerations, between transferring an issue for separate trial from one division or "side" of a single court and transferring it for separate trial in an entirely different court system. This is the jurisdictional obstacle which the district court found impassable in this case, as did the court in *Ohio River Co.* v. *City of Wheeling*, 223 F. Supp. 733."

After discussing Petitioner's contention he holds (42a):

> "Regardless of how the procedure is described, the fact remains that the state court lost jurisdiction of the limitation of liability issue when the claimant contested the owner's right to avail itself of limitation and only an admiralty court had jurisdiction to decide the issue. Furthermore, the only method available to CG&E for invoking that jurisdiction was to follow the procedures prescribed by Section 185 and Supplemental Rule F for Admiralty and Maritime Claims, which incorporates the six months requirement of Section 185."

It cannot be successfully disputed that the *purpose* of the amendment of § 185 and Rule F was to *cut down the time* for asserting the right of a shipowner to limit his liability. That time limit so imposed should be strictly enforced. Both the amendment to § 185 and Rule F *require* that a petition be filed in the District Court of the United States, and as in all limitation of action provisions, failure to so file within six months of written notice of a claim *deprives* the vessel owner of the very substantial benefit of limitation of liability (here from over $700,000 down to approximately $52,000).

This Court very recently in a unanimous opinion written by Mr. Justice Stewart modernizes ancient maritime law by abolishing the Admiralty Rule of divided damages,

whereby the property damage in a maritime collision or stranding is equally divided whenever two or more parties involved are found to be guilty of contributory fault *regardless of the relative degree* of their fault, and found that such damage should be proportionate to the comparative *degree* of fault. *U.S.* v. *Reliable Transfer, Inc.*, 43 L.W. 4610, No. 74363 (May 19, 1975).

As Mr. Justice Black said in *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 437; 74 S. Ct. 608, 623; 98 L. Ed. 806:

> "*Judicial expansion* of the limiting liability act at this date seems *exceptionally inappropriate.* Many of the conditions of the shipping industry which induced the 1851 Congress to pass the Act *no longer prevail.*" (Emphasis added.)

In effect Petitioner seeks an *advisory* opinion of this Court, since it:

(1) had "notice" of the claim on January 30, 1974;
(2) had been sued for approximately $500,000.00, on May 7, 1974;
(3) knew that its tug was worth only $52,500.00;
(4) admits knowledge of 46 U.S.C. § 185;
(5) should have had knowledge of Supplemental Rule F (FRCP);
(6) could unquestionably have filed this liability limitation action in the United States District Court any time before July 30, 1974, without having to try to invoke § 183 and without possibility of dismissal.

COMMENTS ON PETITIONER'S PETITION FOR A WRIT

A. Although great stress was placed on Supplemental Rule F for Admiralty and Maritime Claims, FRCP, in our briefs and in oral arguments below, Petitioner ignores it

completely in his Petition for a Writ of Certiorari. Had the unanimous court below ignored the Rule, this omission might be explainable, but it did not do so (App. M, 42a, 43a).

B. A major point repeatedly argued can be put in question form. Because Patricia Abel was the *sole* victim of this tort feasor, is she to be deprived of full restitution of her damage because her action could not be a "multiple claim situation", in which two or more injured or damaged persons might have shared a single recovery fund? (Br. 4). With this Court's recognition of equity and justice, the answer seems obviously "No".

C. As in all syllogisms, *every* premise must be correct. This is recognized by the Petitioner by the use of the word

> ". . . *if* the foregoing analysis is correct, we are entitled to a reversal. . . ." (Br. 9).

Not only one, but all of C, D, and E are incorrect (Br. 8).

D. Where is "uneven justice" (Br. 15) applicable to CG&E, since it could have followed the law by going into the District Court during the 84-day period after the Complaint for $435,000.00 had been filed on May 7, 1974? Certainly it knew the small value of its tug.

E. It is utter trivia to even comment on the fact that an earlier notice to Petitioner had been sent on March 4, *1973*. (Br. 16).

F. On the same page, 16, Petitioner emphasizes that the six months requirement as to Limitation of Liability appears *only* in 46 U.S.C. § 185. We again call the Court's attention to Supplemental Rule F, which repeats that six months provision.

G. The argument at the top of page 17 to the effect that a single claim situation must await the commencement of litigation

> ". . . after which he may by answer, set up the limitation of liability right as a defense. In the case at bar this is exactly what we sought to do in the state court at the earliest opportunity."

fails utterly because, although it could and did set up Limitation of Liability in the state court, it has repeatedly, in both courts below, admitted knowledge of the correct holding of that court in that it had no jurisdiction over such maritime questions.

H. The *Chickie* is relied on considerably, but it should be noted at the end of the quote, the court says:

> "It should tend, without an express declaration by Congress to increase the economic burden of ship owners, thus placing them in the competitive position which the statute sought to avoid." (Br. 8)

Where is the economic burden here? Is Patricia Abel an individual to be limited to $52,500.00 when her claim against CG&E, a corporation far exceeds ten times that amount?

I. The lengthy argument under E (Br. 23) as to which court has the right to determine all of the issues when the action was originally rightfully filed in the Ohio State court is a complete "straw man situation". Getting back to fundamentals, the time limitation of six months was fixed by both Congress and this Court to prevent abuse *by* ship owners, and even more fundamental is the obvious fact that CG&E wants only to save an enormous sum of money by cutting down its liability for the damage it caused to Patricia Abel.

Lastly, Petitioner urges this Court to consider the hazardous "decision the ship owner must make" in filing an action within six months to limit liability in damages. It completely fails to point out where the "hazard" was in the decision it made as to procedure in this case. That

failure is due solely to the fact that it *took a chance* by failing to file in the United States District Court during the 84 free days following the filing of the original Complaint on May 7, 1974.

CONCLUSION

We are unable to find a rule of this Court providing for the advancement of the consideration of a Petition for Writ of Certiorari, nor are we able to find a provision for allowance of attorneys' fees when a frivolous appeal such as this is filed. Nevertheless, we urge the Court to expedite the denial of this Petition, and if possible to order payment of printing charges and attorneys' fees. In any event, this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

PHILIP J. SCHNEIDER
Attorney for Respondent
1318 Central Trust Tower
Cincinnati, Ohio 45202

Of Counsel:

WAITE, SCHINDEL, BAYLESS & SCHNEIDER
1318 Central Trust Tower
Cincinnati, Ohio 45202

EXHIBIT A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A 743423

(Filed July 10, 1975)

PATRICIA ABEL, d/b/a
NEW RICHMOND BOATING CENTER,
Plaintiff,

v.

CINCINNATI GAS & ELECTRIC CO.,
and
NEW RICHMOND FERRY, INC.,
Defendants.

MOTION TO REINSTATE AND TO ADVANCE CASE FOR TRIAL

Plaintiff represents to the Court that both defendants filed actions in the United States District Court for the Southern District of Ohio, Western Division, for exoneration from and limitation of liability, which said actions were dismissed per motions for summary judgment filed by this plaintiff. Copies of the Order of Dismissal in each case are attached to, made a part hereof, and marked "Exhibits 1 and 2." This plaintiff therefore moves the Court to reinstate the action against these defendants on the active trial docket.

Plaintiff further represents to the Court that the business of operating a marina was her sole source of income,

Exhibit A

that because of the very great amount of money required to reconstruct the marina, which she neither has nor can borrow, she is without any revenue from this business; that she has two children in school, and has been required to borrow money at exorbitant rates of interest in order to continue their education; that at no time has she, as the proprietor of plaintiff, been charged with negligence contributing to cause the demolition of the marina; and that the principal, if not sole issue is the reasonable amount which she should be paid from these defendants for the restoration thereof.

Therefore, under O.R.C. § 2311.07, she moves the Court that this case be advanced on the docket for trial.

PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

MEMORANDUM

Complaint and Jury Demand was filed in this Court on May 7, 1974. Answers were filed by both defendants on June 24 and July 10; after preliminary pleadings, on November 6, plaintiff filed motions to strike, etc., and thereafter defendants filed motions to stay this proceeding until after it was determined whether these defendants were properly before the United States District Court on their actions for exoneration from or limitation of liability. After hearing in open court, this court denied the motions for summary judgment and granted a stay requested by defendants until actions in the United States District Court were determined.

Exhibit A

As disclosed by the Orders signed by Honorable David S. Porter, United States District Judge, on July 8, 1975, the actions of both defendants as to this plaintiff were thereby dismissed. This case is now postured for final determination by a jury in this Court.

O.R.C., § 2311.07 provides in part:

> ". . . for good cause shown are especially assigned for trial or hearing out of their regular order".

Plaintiff has claimed continuing damages because of the loss of her marina and by this motion demonstrates the great hardship which continuing delay causes. Therefore, this plaintiff urgently prays this Court to advance her case for trial out of its regular order for the reasons stated herein.

PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Memorandum have been mailed to James L. O'Connell, Attorney for Defendant, C. G. & E. Co., and to William B. Singer, Attorney for Defendant, New Richmond Ferry, Inc., this ____ day of July, 1975.

PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 75-2100

(Filed October 20, 1975)

CINCINNATI GAS & ELECTRIC COMPANY
PLAINTIFF, OWNER OF M/V "REDDY
KILOWATT," IN AN ACTION FOR EXON-
ERATION FROM OR LIMITATION OF
LIABILITY,

Plaintiff-Appellant,

v.

PATRICIA ABEL, d/b/a NEW RICHMOND
BOATING CENTER,

Defendant-Appellee.

MOTION OF CLAIMANT-APPELLEE, PATRICIA ABEL, d/b/a NEW RICHMOND BOATING CENTER, TO ADVANCE CASE FOR HEARING

Motion Granted. Case will be assigned to calendar upon submission of briefs by all parties.

J. P. HEHMAN, *Clerk*

Claimant-Appellee, Patricia Abel, represents to the Court that Plaintiff-Appellant, C.G. & E. Co., and the New Richmond Ferry Company, Inc., filed separate actions in the United States District Court for the Southern District of Ohio, Western Division, for "Exoneration From and

Exhibit B

Limitation of Liability", which were consolidated on March 3, 1975, and which said actions were dismissed upon motions for summary judgment filed by this claimant-appellee. This Opinion dismissing C.G. & E. begins at Appendix, p. 54, and the Order is App. 59. New Richmond Ferry did not appeal.

This Claimant-Appellee moves the court, pursuant to Rule 7(b) of this Court, to advance this case for hearing on the active hearing calendar.

Claimant-Appellee further represents to the Court that the business of operating a marina was her sole source of income, that because of the very great amount of money required to reconstruct the marina, which she neither has nor can borrow, she is without any revenue from this business; that she has two children in school, and has been required to borrow money at exorbitant rates of interest in order to continue their education; that at no time has she, as the proprietor of New Richmond Boating Center, been charged with negligence contributing to cause the demolition of the marina; and that the principal, if not sole issue, is the amount of money which she should be paid for the restoration thereof.

Therefore, under Rule 7(b) of the Rules of the United States Court of Appeals for the Sixth Circuit, she moves the Court that this case be advanced on the active calendar for hearing.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Claimant-Appellee
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

Exhibit B

MEMORANDUM

Complaint and jury demand was filed in the Court of Common Pleas of Hamilton County, Ohio, on May 7, 1974. Answers were filed by both defendants on June 24 and July 10. After preliminary pleadings, on November 6, Claimant-Appellee (Plaintiff in the Court of Common Pleas action) filed Motions to Strike, etc., and thereafter defendants filed motions to stay the proceeding until after it was determined whether these defendants were properly before the United States District Court on their actions for exoneration from or limitation of liability. After hearing in open court, the Court of Common Pleas of Hamilton County, Ohio, denied the motions for summary judgment and granted the stay requested by defendants, until actions, if filed within thirty days, in the United States District Court, were determined.

The Opinion and Order entered by the Honorable David S. Porter, United States District Judge, on July 8, 1975, dismissed the actions of both C.G. & E. and the New Richmond Ferry, Inc., although conditionally as to New Richmond.

Thereupon Claimant-Appellee promptly filed in the Court of Common Pleas of Hamilton County, Ohio, a Motion to Reinstate and to Advance Case For Trial (July 10, 1975) a copy of which is attached hereto and marked "Exhibit A". Upon C.G. & E.'s Notice of Appeal filed herein, the Common Pleas Court deferred action thereon until a determination herein.

This case is more than ready for a final appellate hearing and determination by this Honorable Court. Rule 7(b) provides:

> "(b) *Advancement of Hearing.* The court may, on its own motion or for good cause shown on motion of either party, advance any case to be heard at any session, though the time permitted under the rules for filing briefs may not have expired at the day set for hearing."

Exhibit B

Claimant-Appellee has claimed continuing damages (App. p. 10, par. 18) because of the loss of her marina, and by this motion demonstrates the great hardship which continued delay causes. Therefore, this Claimant-Appellee urgently prays this Court to advance her case for hearing out of its regular order, for the reasons stated herein.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Claimant-Appellee
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Memorandum have been mailed to all counsel of record for Plaintiffs-Appellants in this case, this 20th day of October, 1975.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Claimant-Appellee

EXHIBIT C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A 743423

PATRICIA ABEL, d/b/a
NEW RICHMOND BOATING CENTER,

Plaintiff,

v.

CINCINNATI GAS & ELECTRIC CO.,

and

NEW RICHMOND FERRY, INC.,

Defendants.

MOTION TO REINSTATE AND TO ADVANCE CASE FOR TRIAL

Plaintiff represents to the Court that following the first Motion to Reinstate and to Advance case for Trial, filed with this court on July 10, 1975, defendant appealed to the United States Court of Appeals for the Sixth Circuit. Plaintiff moved that court on October 20, 1975, to advance the case for hearing, which motion was granted by three judges of the United States Circuit Court of Appeals. A photocopy of said motion and granting is attached hereto and made a part hereof. The case was briefed and set for argument on February 13, 1976. Following that argument, that court unanimously affirmed the dismissal of the case in the United States District Court from which the appeal was perfected, and filed its printed opinion on April 16, 1976. Thus that action no longer is a bar to the trial of

Exhibit C

this action, and the question of limitation of liability is out of this case.

Therefore, under O.R.C. § 2311.07, plaintiff moves the Court that this case be advanced on the docket for trial.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
WAITE, SCHINDEL, BAYLESS & SCHNEIDER
Trial Attorney for Plaintiff
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

MEMORANDUM

Plaintiff reincorporates the memorandum filed with the first Motion to Reinstate and to Advance.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Memorandum have been mailed to James L. O'Connell, Attorney for Defendant, C.G. & E. Co., and to William B. Singer, Attorney for defendant, New Richmond Ferry, Inc., this ____ day of May, 1976.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff

EXHIBIT D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A 743423

(Filed June 10, 1976)

PATRICIA ABEL, d/b/a
NEW RICHMOND BOATING CENTER,

Plaintiff,

v.

CINCINNATI GAS & ELECTRIC CO.,
a corporation, et al.,

Defendants.

MOTION FOR SEPARATE TRIAL OF LIABILITY AND DAMAGES

Now comes the plaintiff, Patricia Abel, doing business as New Richmond Boating Center, and moves the Court for an order to separate the trial in the above-mentioned action, presently set for August 21, 1976, so as to proceed to trial on a bifurcated basis, liability first, and then damages in the event of a finding of liability, in accordance with Rule 42(B) of the Ohio Rules of Court.

Exhibit D

Said motion is made in furtherance of convenience to the Court, and further said trial on a bifurcated basis would be conducive to expedition and economy.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
WAITE, SCHINDEL, BAYLESS & SCHNEIDER
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

MEMORANDUM

This case particularly lends itself to bifurcation for the following reasons:

Defendants filed separate actions in the United States District Court for the Southern District of Ohio, Western Division, which were consolidated by that Court. No defendant is required to be named in such an action, but on the same day it filed in the District Court and served upon plaintiff, Patricia Abel, d/b/a New Richmond Boating Center, through her attorney, Philip J. Schneider, its "Notice of Action Brought for Exoneration from or Limitation of Liability". On December 20, 1974, Patricia Abel filed her "Claim and Answer". Defendant, New Richmond Ferry, because the amount of damages prayed against it did not warrant an action for limitation of liability, but is a necessary party, as it was the beginning of causation.

Those petitions were titled "Complaints for Exoneration from or Limitation of Liability", and filed on December 3, 1974. The C.G. & E. petition was numbered Civil Action C-1-74-480, and a bond was posted by the Insurance Com-

pany of North America as surety in the sum of $52,500.00, ". . . together with interest thereon at the rate of six (6%) per cent per annum from the date of this undertaking, for the payment of such sum and interest to the benefit of whom it may concern, . . ."

Prior to that filing, Defendant, C.G. & E., had petitioned this Court to stay this action until that proceeding had been perfected. This Court entered an order accordingly on December 2, 1974, Image 467.

In due course a motion by Patricia Abel, etc. to dismiss and/or for summary judgment against C.G. & E. was granted by the United States District Court on July 8, 1975. A copy of the order is attached hereto and marked "Exhibit A".

Thereafter, C.G. & E. perfected an appeal to the United States Circuit Court of Appeals, which action was numbered 75-2100 on the docket of that Court, and claimant-appellee Abel filed her motion "to advance case for hearing" on October 20, 1975, based on hardship, which motion was forthwith granted. Arguments were heard by the United States Court of Appeals on February 13, 1976, and a printed opinion was filed April 16, 1976, unanimously affirming the United States District Court.

C.G. & E. now suggests that it is going to petition the Supreme Court of the United States for certiorari, and will ask this Court for another stay pending disposition of that action.

Thus it can be seen that *if there is liability*, C.G. & E. would have to pay plaintiff, Patricia Abel, the sum of $52,500.00, with interest from December 3, 1974. Plaintiff believes she can prove far more than that sum as damages if not limited to the $52,500.00 under maritime law.

Plaintiff's marina was constructed from the Ohio shore of the Ohio River at New Richmond, Ohio, extending into the

river when, on July 7, C.G. & E.s tugboat "KILOWATT" ran into and totally damaged the marina (see paragraphs 6 and 7 of the Complaint filed herein on May 7, 1974). Defendant, C.G. & E., filed an answer asserting seven defenses and a cross-claim, primarily addressed to co-defendant, New Richmond Ferry, Inc. Liability being disputed, it should be tried by a jury on the evidence *as to that issue*. It may be that all of the defenses are frivolous, and that a directed verdict would be granted. In any event, presently there is a dispute as to liability, and should defendant prevail there would be no question of the amount of payment.

Usually in a motion such as this the foregoing would be sufficient to cause bifurcation. However, in this instance there are other very considerable elements to be considered by this Court. First, if there is liability and no limitation as to the amount of damages, plaintiff would have to prove the allegations of her complaint, which would require the employment of possibly three expert maritime surveyors (appraisers), whose fees are very high. Plaintiff is without any funds, and could not possibly gamble the very large sum involved by employing such experts without first knowing that liability has been determined. With the question of liability being determined in favor of plaintiff, she would be assured of recovering $52,500.00, and could therefore employ the necessary experts to prove the very large damages which she knows to exist. The trial, if not bifurcated, would require that several such surveyors be ready and able to testify on August 21st. If such surveyors knew her financial condition (as they would inevitably), it is unlikely that she could adequately prepare for trial on damages.

Secondly, plaintiff also claims "loss of use and profits", which would require different expert testimony, again at

great expense. Such experts would have to be employed promptly so that proper studies could be made. If there is no liability on the part of C.G. & E., expenditures for such expert studies would be wasted.

We submit that this is one of the most ideal cases for bifurcation that could be presented, and *without any prejudice* to defendant, C.G. & E., since, if no liability, it could then make a determination as to whether to proceed with the considerable cost of certiorari proceedings in the Supreme Court. Furthermore, there would be a far better chance of settlement with liability determined, thus avoiding the time-consuming trial.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
WAITE, SCHINDEL, BAYLESS & SCHNEIDER
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Memorandum were mailed to all counsel of record for defendants in this action by ordinary United States Mail, postage prepaid, this ____ day of June, 1976.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff

EXHIBIT E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A 743423

PATRICIA ABEL, d/b/a
NEW RICHMOND BOATING CENTER,
Plaintiff,

v.

CINCINNATI GAS & ELECTRIC CO.

and

NEW RICHMOND FERRY, INC.,
Defendants.

REPLY MEMORANDUM OF PLAINTIFF RE MOTION TO SEPARATE TRIALS

(Filed June 23, 1976)

This motion of plaintiff is not one to be taken lightly, because the consequences of an adverse decision would be inestimably damaging to plaintiff.

C.G.& E. in its brief says that it—

> ". . . will contend that any damages sustained by the plaintiff as the result of the incident of July 7-8, 1972, *were minimal.*"

When a tort feasor totally destroys the lifelong product and business of an innocent bystander, which property was valued in excess of $400,000.00 in 1972, such damage would

not be *minimal*, even to C.G.& E. This allegation is premised on the same "quicksand" as is its Third Defense (Paragraph 7), to-wit: *contributory negligence* of the plaintiff herself, who was on shore when the catastrophe was committed.

The Fourth Defense is even more ridiculous, by alleging that she assumed the risk of any damages sustained by her. Can it be successfully contended that merely building a marina, where authorized by the proper U. S. Governmental agency, and in operation for years on the Ohio shore of the Ohio River extending into the waters of the Ohio as of course it had to, makes her "assume the risk" of a towboat owned by C.G.& E. ramming the marina repeatedly? A negative answer seems obvious.

Passing the Fifth Defense, of laches, this Court's attention is directed to the Sixth Defense (paragraph 10), which alleges that plaintiff negligently failed to mitigate damages and thus is not entitled to recover. This is particularly false when it is averred under oath in both this Court, the United States District Court, plus the United States Circuit Court of Appeals that plaintiff is without any funds and without borrowing capacity, having no collateral, either of which would be required to rebuild this marina, thus the only way of mitigating damages.

We pass C.G.& E.'s cross-claim, as it only involves the co-defendant, the New Richmond Ferry, which may or may not be liable in excess of the known damage caused by it.

This allegation of mitigation of damages raises an interesting point particularly applicable to this motion to bifurcate. If and when liability is established and should the responsible party be the C.G. & E. Co., then there may be a possibility that plaintiff could mitigate damages by borrowing funds to build anew the presently destroyed marina.

If she could do so, the result would certainly be the mitigation of the mounting damages now accruing.

As to the contention that discovery is necessary, this is true in practically all disputed litigation. Plaintiff is ready to be deposed by New Richmond Ferry and/or C.G.& E., which could take only a few hours or days at the utmost. In this case, it seems certain that both defendants are as knowledgeable as to the facts as is the plaintiff.

An appeal to the United States Supreme Court, if perfected, certainly would take an undeterminable amount of time. The liability of C.G.& E., which amounts to its conduct, is as readily distinguishable as the value of the damaged property, and thus should be determined separately as we pointed out in our original memorandum.

Respectfully submitted,

/s/ PHILIP J. SCHNEIDER

PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff
WAITE, SCHINDEL, BAYLESS
& SCHNEIDER
1318 Central Trust Tower
Cincinnati, Ohio 45202
621-0267

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum were mailed to all counsel of record for defendants in the within action this ..... day of June, 1976.

/s/ PHILIP J. SCHNEIDER
PHILIP J. SCHNEIDER
Trial Attorney for Plaintiff